

SANDERS, J. (dissenting)—I agree with our majority and the Court of Appeals that the trial court abused its discretion when it refused to appoint Dr. Richard Wollert as John Anderson’s expert witness and thus denied Anderson the services of a trial expert to rebut the State’s evidence. I disagree, however, that the acts relied upon by the State could constitute recent overt acts. Therefore I would reverse and dismiss.

I. Facts and Procedural History

In 1988 Anderson pleaded guilty to first degree statutory rape of a two-and-a-half-year-old boy. Anderson was 17 years old. He was sentenced to a juvenile rehabilitation center.

In 1990 after serving his time at the juvenile rehabilitation center, Anderson voluntarily committed himself to Western State Hospital (WSH) for treatment of sexual sadism and pedophilia.¹ He remained at WSH until the State filed its commitment petition in 2000.

During his 10-year residence at WSH, Anderson engaged in consensual homosexual relationships with four adult male patients: Darryl, Curtis, Bobby, and Rory.² Darryl, Curtis, and Bobby were diagnosed mildly or moderately retarded.

¹ Initially Anderson was admitted involuntarily for a 72-hour evaluation under chapter 71.05 RCW. Afterward he remained voluntarily.

² The record indicates Anderson engaged in heterosexual relationships as well.

Rory was of average intelligence.³ Anderson's relationship with Darryl, Curtis, and Bobby took place between 1991 and 1996. Anderson's relationship with Rory ended in late 1999.

As part of group therapy Anderson and his partners spoke about these relationships, ending them when counseled to do so, albeit not immediately.⁴ Anderson admitted he took advantage of Darryl, Curtis, and Bobby but not Rory.

Neither Darryl, Curtis, Bobby, nor Rory requested any action against Anderson even though encouraged to do so if they felt victimized. At no time did the staff at WSH pursue charges against Anderson even though the possibility was investigated. Dr. Larry Arnholt testified there was no "coercive or forceful aspects to any of these sexual relationships." Clerk's Papers (CP) at 181. Sexual relationships between patients are against WSH rules but are not uncommon. WSH makes condoms available.

As a voluntary patient Anderson could leave WSH with or without permission. Anderson would regularly take permissive leave up to four times a

However, the State does not argue these relationships were recent overt acts.

³ There are four categories of mental retardation: mildly retarded, moderately retarded, severely retarded, and profoundly retarded. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 37-45 (4th ed. 1994).

⁴ In a sexual history summary Anderson provided to his sex offender treatment provider, Anderson characterized his sexual history as "deviant" and "nondeviant" without specific or readily identifiable reason. Report of Proceedings (RP) at 120-22 (testimony of Maureen Saylor).

month generally to visit his mother for a couple days. At least twice during his 10-year residence, Anderson left without permission. During one of his nonpermissive leaves, he admitted to consuming alcohol; during the other he helped a friend find an apartment. Nothing in the record suggests Anderson engaged in sexually violent activity during any of his time away from WSH.

During his time at WSH Anderson underwent various treatments, therapies, and evaluations wherein he admitted to numerous sexually violent offenses as a juvenile and to sexually violent fantasies. According to Anderson's last assessment, he can now control his sexual arousal.

On February 20, 2000, Anderson informed WSH staff he intended to leave WSH permanently. On February 25, 2000,⁵ the State filed a commitment petition alleging Anderson was a sexually violent predator⁶ and his homosexual

⁵ The record indicates on May 16, 1999, Anderson was recommended for civil commitment as a sexually violent predator. Clerk's Papers (CP) at 36. It is unknown why the State waited approximately 10 months to file its petition.

⁶ "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

Former RCW 71.09.020(16) (2006).

"Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act of the person is not totally confined at the time the

relationships, among other conduct, constituted recent overt acts.

Anderson moved for judgment on the pleadings, arguing insufficient allegations to support the State's claim that he is a sexually violent predator or that he committed a recent overt act. The trial court denied Anderson's motion to dismiss and then tried him, pursuant to chapter 71.09 RCW, to determine whether Anderson should be civilly committed. The trial court found Anderson's homosexual relations with Darryl, Curtis, Bobby, and Rory were substitutes for his preferred victims. The trial court concluded Anderson was a sexually violent predator, and these homosexual relations constituted recent overt acts. The Court of Appeals affirmed. *In re Det. of Anderson*, 134 Wn. App. 309, 323-24, 139 P.3d 396 (2006). However, the Court of Appeals remanded for a new trial because the trial court refused to permit "Anderson to engage an appropriate expert witness." *Id.* at 322.

II. Standard of Review

Whether an act is both recent and overt is a mixed question of law and fact.⁷ *In re Det. of Marshall*, 156 Wn.2d 150, 158, 125 P.3d 111 (2005). To resolve a

petition is filed

Former RCW 71.09.020(7) (2006).

⁷ This analysis does not defeat the purpose of the fact finder; appellate courts frequently analyze the legal sufficiency of evidence. *See, e.g., Bunch v. Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005).

mixed question of law and fact we apply legal principles to factual circumstances. *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007). Unchallenged factual findings are verities on appeal; however, the application of applicable law to those facts is a question of law reviewed de novo. *Id.*

The facts here are unchallenged. Anderson admits he was convicted of a sexually violent offense, suffers from a mental abnormality, and engaged in sexual relations while a patient at WSH. The State concedes it must prove Anderson committed a recent overt act. *Anderson*, 134 Wn. App. at 323. Therefore, all that remains is the “legal inquiry” into whether Anderson’s consensual homosexual relationships, as well as other conduct, are recent overt acts. *Marshall*, 156 Wn.2d at 158.

The issue should be framed as one of consensual homosexual relations for two reasons. First, the State does not allege Anderson’s heterosexual relationships were recent overt acts. Second, Washington law does not presume an individual is incapable of consenting to sex due to an intellectual disability.⁸ As such the issue is

⁸ See *State v. Ortega-Martinez*, 124 Wn.2d 702, 711, 881 P.2d 231 (1994) (holding the State must prove the “victim had a condition which prevented him or her from *meaningfully* understanding the nature or consequences of sexual intercourse”); *In re Det. of LaBelle*, 107 Wn.2d 196, 204-05, 728 P.2d 138 (1986) (stating mental illness does not automatically render a person unable “to provide for . . . essential human needs”); see also Elizabeth J. Reed, Note, *Criminal Law and the Capacity of Mentally Retarded Persons To Consent to Sexual Activity*, 83 Va. L. Rev. 799, 805 (1997) (“[E]xperts in the field of mental retardation generally agree that mentally retarded persons have a fundamental right to sexual expression.”). Simply put, “an individual will not be considered presumptively incompetent, for any or all purposes, simply

whether Anderson committed a recent overt act by engaging in consensual homosexual conduct with four adult patients at WSH, among other conduct, while a voluntary patient at WSH.

III. Analysis

In re Detention of Harris, 98 Wn.2d 276, 284-85, 654 P.2d 109 (1982) first recognized due process requires proof of a recent overt act to determine the current dangerousness of one who is subject to involuntary civil commitment. *In re Det. of Albrecht*, 147 Wn.2d 1, 8 n.9, 51 P.3d 73 (2002). “[I]nvolutionary commitment requires a showing that the potential for doing harm is ‘great enough to justify such a massive curtailment of liberty.’” *Harris*, 98 Wn.2d at 283 (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)). For constitutional due process purposes, we defined a recent overt act as an act “which has caused harm or creates a reasonable apprehension of dangerousness.” *Id.* at 285.

The purpose behind the recent overt act requirement is to add objectivity to an otherwise subjective determination of mental illness and dangerousness. *See Harris*, 98 Wn.2d at 284; *see also* Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 Emory L. J. 275, 318 (2006) (“The strong consensus of the risk

because she is institutionalized.” Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. Rev. L. & Soc. Change 517, 528-29 (1992-94).

literature is that the number and type of prior violent acts committed by an individual are the factors most germane to a prediction of future behavior.”).

In re Detention of Young, 122 Wn.2d 1, 857 P.2d 989 (1993) applied the recent overt act requirement established in *Harris* to sexually violent predator proceedings; “the State must provide evidence of a recent overt act in accord with *Harris*[⁹] whenever an individual is not incarcerated at the time the petition is filed.” *Young*, 122 Wn.2d at 41.

After *Young* the legislature amended chapter 71.09 RCW to define a recent overt act as “any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm,” tracking the language in *Harris*. Laws of 1995, ch. 216, § 1(5).

However, in 2001 the legislature redefined a recent overt act as “any act *or threat* that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm *in the mind of an objective person who knows of the history and mental condition of the person engaging in the act*.” Laws of 2001, ch. 286, § 4(5) (emphasis added), former RCW 71.09.020(10) (2006). If possible, this legislative addition to our due process requirement should be construed as consistent with the constitutional justification for civil confinement. *See Young*, 122 Wn.2d at 41.

⁹ 98 Wn.2d 276.

The constitutional justification for civil confinement is current dangerousness caused by a mental defect plus a recent overt act, which “satisfies the dangerousness element required by due process.” *Albrecht*, 147 Wn.2d at 11; *see also Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). It must be determined whether Anderson’s conduct was both recent and dangerous.

A. Anderson’s conduct was not recent

“[E]vidence [of an overt act] must be recent to be meaningful.” *Harris*, 98 Wn.2d at 284. “The dangerousness must be current.” *Albrecht*, 147 Wn.2d at 7. “[T]he recency of the acts upon which the State bases its commitment petition may be a significant factor in determining whether the individual is presently dangerous as required by both the statute and due process.” *In re Det. of Henrickson*, 140 Wn.2d 686, 697, 2 P.3d 473 (2000).

Former RCW 71.09.020(10) does not define “recent,” but the dictionary definition is “of or belonging to the present period or the very near past.” Webster’s Third New International Dictionary 1894 (1993). “[C]urrent” is defined as “occurring in or belonging to the present time : in evidence or in operation at the time actually elapsing.” *Id.* at 557.

Anderson’s homosexual relationship with Darryl ended in 1991, and his relationship with Curtis and Bobby ended around 1996, years before the State filed

its petition on February 25, 2000.¹ Therefore, even presuming Darryl, Bobby, and Curtis lacked the capacity to meaningfully consent, a presumption without support under Washington law,¹¹ Anderson's relationships with these men do not prove he is *currently* dangerous because these relationships ended years before the State filed its petition.

Moreover, these prior relationships lack relevancy to Anderson's *current* dangerousness because the trial court found Anderson is currently able to control his sexual arousal. In order to be subjected to civil commitment "there must be proof of serious difficulty in controlling behavior." *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002).

Anderson's ability to control his behavior is not only relevant, it is dispositive; current dangerousness is the foundation of sexually violent predator commitment. *See In re Det. of Henrickson*, 140 Wn.2d 686, 692, 2 P.3d 473 (2000) ("The Washington sexually violent predator statute is premised on a finding of the present dangerousness of those subject to commitment."); *Foucha v. Louisiana*, 504 U.S. 71, 78, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) (requiring the dual predicates of current mental illness and current dangerousness).

¹ The trial court's findings of fact do not specify actual dates; however, the uncontroverted testimony indicates Anderson's relationship with Darryl ended in 1991, his relationships with Bobby and Curtis ended around 1995 or 1996. CP at 185-86; RP at 162, 168-69.

¹¹ *See supra* note 8.

Even assuming these long-past relationships were somehow involuntary, they do not establish Anderson's *current* dangerousness. Nor can Anderson's current dangerousness be established under the analysis of *In re Detention of Pugh*, 68 Wn. App. 687, 845 P.2d 1034 (1993).¹²

In *Pugh* the Court of Appeals stated, "in considering whether an overt act, evidencing dangerousness, satisfies the recentness requirement, it is appropriate to consider the time span in the context of all the surrounding relevant circumstances." *Id.* at 695. The critical circumstance in *Pugh* was Pugh's incarceration for the five-year period prior to the State's seeking involuntary commitment. *Id.* at 689. "The absence of more recent overt acts during confinement is readily explainable as a lack of opportunity to offend rather than a demonstration of improvement so as to negate the showing that he presents a substantial risk of physical harm." *Id.* at 696. However, *Pugh* recognized the "absence of overt acts in the last 5 years might be sufficient to discount the diagnosis and prediction of dangerousness were Pugh then living in the typical community." *Id.*

Anderson may not have been living in the "typical community" envisioned by

¹² To find a recent overt act, the trial court relied primarily on *Pugh*, 68 Wn. App. 687. The relevancy of the *Pugh* analysis in a sexually violent predator context is debatable. First, *Pugh* involved involuntary commitment pursuant to chapter 71.05 RCW. Second, *Pugh* was published six months prior to *Young*, 122 Wn.2d 1, yet *Young* never cites *Pugh*, and a majority of this court has never cited *Pugh* in any subsequent recent overt act analysis.

the court in *Pugh*; however, Anderson was also not meaningfully “isolated from children toward whom he has a predilection to cause harm” because he regularly left the grounds of WSH up to four times a month. *Id.* If Anderson were truly unable to suppress his sexual urges toward children, some act or attempt would have manifested itself during all those years Anderson had access to the community.

The *Pugh* analysis is inapplicable to resolving the recentness element of our overt act requirement. Anderson’s relationship with Rory remains as the barometer of Anderson’s current dangerousness.

Anderson ended his relationship with Rory in late 1999. The State filed its petition on February 25, 2000. At least two months elapsed between Anderson’s ending his relationship with Rory and the State’s filing its petition. This delay renders Anderson’s relationship with Rory too remote to be a meaningful barometer of Anderson’s current dangerousness.¹³

The majority argues that *Marshall*, 156 Wn.2d 150, and *Henrickson*, 140 Wn.2d 686, stand for the proposition that two months is sufficiently recent because in *Marshall* and *Henrickson* the overt act in question occurred years before the State filed its petition. Majority at 8-9. These cases are distinguishable because Anderson was not incarcerated at the time the State filed its petition.

¹³ For example, in *Harris* we held a five-day delay too remote to be meaningful. *Harris*, 98 Wn.2d at 284.

In *Marshall* and *Henrickson* the individuals subject to commitment were incarcerated at the time the State filed its petition, making it “impossible” for the State to prove a recent overt act. *Young*, 122 Wn.2d at 41; *see also Marshall*, 156 Wn.2d at 154; *Henrickson*, 140 Wn.2d at 689. “[W]here the State lacks an opportunity to prove present dangerousness with evidence of a recent overt act, the statute and our case law relieve the State of pleading and proving a recent overt act.” *In re Det. of Lewis*, 163 Wn.2d 188, 194, 177 P.3d 708 (2008) (citing *Young*, 122 Wn.2d at 41). Correlatively, however, where the State has the opportunity to prove present dangerousness with evidence of a recent overt act, due process requires it to do so. *Young*, 122 Wn.2d at 41. In other words, due process does not require the “impossible,” but it does require the possible. *Id.* As Anderson was not incarcerated at the time the State filed its petition, it was possible for the State to show Anderson committed a *recent* overt act.

Nevertheless, even assuming two months is sufficiently recent to be meaningful, Anderson’s consensual homosexual relationship with Rory, an adult of average intelligence, does not evince Anderson is currently dangerous.

B. Anderson’s conduct was not an overt act

To reiterate, the legislative definition of a recent overt act is “any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who

knows of the history and mental condition of the person engaging in the act.” Former RCW 71.09.020(10). The State does not argue Anderson’s conduct caused sexually violent harm. Instead, the State argues Anderson’s conduct causes a reasonable apprehension of sexually violent harm.

The statute does not define “reasonable apprehension.” Anderson argues we should incorporate the common law definition of “reasonable apprehension.” *See State v. Wilson*, 125 Wn.2d 212, 217-18, 883 P.2d 320 (1994) (recognizing Washington courts may look to the common law to define undefined statutory terms).¹⁴ This argument overlooks the origin of the recent overt act requirement in the rationale of *Harris*. As such, *Harris* and its progeny provide a better starting point for analyzing “reasonable apprehension” in the sexually violent predator context.

In *Harris* we stated, “[t]he risk of danger must be substantial and the harm must be serious before detention is justified.” 98 Wn.2d at 284. For example in *In re Detention of Meistrell*, 47 Wn. App. 100, 103, 107, 733 P.2d 1004 (1987), the Court of Appeals affirmed the trial court’s finding of a recent overt act involving the subject of the petition repeatedly placing his two young children in actual

¹⁴ The common law defines a reasonable apprehension of harm as intentional conduct creating the perception of an imminent physical harm accompanied by an apparent ability to carry out the harm. *Howell v. Winters*, 58 Wash. 436, 438, 108 P. 1077 (1910).

physical danger. Similarly, in *In re Detention of A.S.*, 91 Wn. App. 146, 955 P.2d 836, *aff'd*, 138 Wn.2d 898, 982 P.2d 1156 (1999), the Court of Appeals affirmed the trial court's finding of a recent overt act involving repeated threats of suicide coupled with the respondent's making sawing motions against her wrist with a comb three days after an attempted suicide. *Id.* at 152.

These cases suggest an overt act requires an actual or obvious risk of substantial physical harm to self or others. *See Harris*, 98 Wn.2d at 284-85; *see also* Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 Nw. U. L. Rev. 1, 21 (2003) ("Unless the individual engages in conduct that causes legally-defined harm or that is otherwise obviously risky, the government should not be permitted to intervene preventively.").

An actual or obvious risk of substantial physical harm, however, is only part of the equation. The legislature added an element not found in *Harris*, and this element should be construed constitutionally, if possible.

To satisfy due process the legislature's addition to the recent overt act requirement demands a causal relationship between the person's diagnosed mental or personality disorder and his conduct. This relationship reflects "the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.'" *Crane*, 534 U.S. at 412

(quoting *Kansas*, 521 U.S. at 360) “That distinction is necessary lest ‘civil commitment’ become a ‘mechanism for retribution or general deterrence’—functions properly those of criminal law, not civil commitment.” *Id.* (quoting *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurring)); *see also* Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 Ind. L. J. 157 (1996) (discussing the rejection of prevention as the sole justification for civil commitment).

The statute requires this causal connection in its definition of a sexually violent predator as “any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder *which makes* the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” Former RCW 71.09.020(16) (2006) (emphasis added); *see also* RCW 71.09.010 (stating “sexually violent predators generally have personality disorders and/or mental abnormalities which are unamenable to existing mental illness treatment modalities and *those conditions render them* likely to engage in sexually violent behavior.” (emphasis added)).

Moreover, this causal connection gives purpose and meaning to the definition of a recent overt act, which requires knowledge of the person’s history and mental disorder. Former RCW 71.09.020(10). This establishes the rational basis for the apprehension of sexually violent harm, separating the everyday activities of life

from activities that justify civil commitment. *Harris*, 98 Wn.2d at 283.

Otherwise, a person risks civil commitment once convicted of a sexually violent offense and diagnosed with a mental illness regardless of any causal relationship between the mental condition and the conduct in question. Persons could be subject to commitment based solely on their status as a prior sexual offender and fear of mental illness. *See Harris*, 98 Wn.2d at 281 (stating “[t]he laws of involuntary civil commitment should not reflect the[] irrational fears of mental illness”).

Civil commitment for sex predators would then no longer “focus[] on treating petitioners for a current mental abnormality, and protecting society from the sexually violent acts *associated* with that abnormality.” *Young*, 122 Wn.2d at 21 (emphasis added); *see also* Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 Conn. L. Rev. 319 (2003) (positing a substantive due process right to treatment).

Here we must examine the relationship, if any, between the conduct the State alleges to be a recent overt act and Anderson’s diagnosed pedophilia and sexual sadism. *Compare Albrecht*, 147 Wn.2d 1 (alleged sexually violent predator with a history of child sexual assault and diagnosed with pedophilia violating community release conditions) *with Marshall*, 156 Wn.2d at 159 (alleged sexually violent predator with a history of child molestation and diagnosed with pedophilia raping a

developmentally disabled woman); *In re Det. of Froats*, 134 Wn. App. 420, 140 P.3d 622 (2006) (alleged sexually violent predator with a history of child-kidnapping and molestation and diagnosed with pedophilia sexually harassing a developmentally delayed fellow inmate and displaying hundreds of pictures of children); *In re Det. of Hovinga*, 132 Wn. App. 16, 130 P.3d 830 (2006) (alleged sexually violent predator with a history of raping young girls and masturbating while covertly following girls around a store); *In re Det. of Robinson*, 135 Wn. App. 772, 146 P.3d 451 (2006) (alleged sexually violent predator with a history of child rape in a locked room with a child), *review denied*, 161 Wn.2d 1028, 172 P.3d 360 (2007); *In re Det. of Broten*, 130 Wn. App. 326, 122 P.3d 942 (2005) (alleged sexually violent predator with a history of child molestation and a diagnosis of pedophilia being unsupervised at a playground); *In re Det. of Albrecht*, 129 Wn. App. 243, 252, 118 P.3d 909 (2005) (alleged sexually violent predator with a history of child sexual assault and diagnosed with pedophilia luring a young boy).

As succinctly stated by Judge Armstrong, “in every case where we found sufficient evidence of a recent overt act, the act was a continuation of the sex offender’s pathological behavior.” *Anderson*, 134 Wn. App. at 327-28 (Armstrong, J., dissenting).

Thus, a recent overt act is an act presenting an actual or obvious danger of substantial physical harm or a threat of an actual or obvious danger of substantial

physical harm caused by the individual's diagnosed mental or personality disorder.

The majority asserts that Anderson committed a recent overt act by engaging in consensual homosexual conduct.¹⁵

Anderson's history of sexual offense involves the rape of a child. He was convicted of raping a two-and-a-half-year-old boy. He has admitted to raping other boys as a juvenile. He is a diagnosed pedophile and sexual sadist.

Over the course of 10 years, Anderson engaged in consensual homosexual relationships with four adult males, yet only one relationship is arguably recent to be a useful barometer of Anderson's current dangerousness. This conduct does not result from Anderson's diagnosed pedophilia or sexual sadism. A consensual homosexual relationship with an adult male of average intelligence is inconsistent with a diagnosis of pedophilia. The record does not indicate any sexual violence or otherwise forceful conduct consistent with Anderson's diagnosed sexual sadism.

Dr. Amy Phenix, the State's expert witness, testified Anderson's conduct was a form of victim substitution. However, whether Anderson's consensual sexual activity with an adult is a substitution for his victimization of children is irrelevant to the issue of whether Anderson's conduct satisfies the due process requirement of a recent overt act. As a mixed question of law and fact the underlying facts are found by the fact finder with the court applying legal principles to those facts.

¹⁵ It does not contend disclosing sexual fantasies or breaking the rules at WSH can be considered recent overt acts. Therefore I need not discuss why they are not.

Erwin, 161 Wn.2d at 687. Here, Anderson concedes the underlying facts. “Victim substitution” may be an interesting psychiatric label, but it is not dispositive of the legal issue before this court. Whether Anderson’s conduct constitutes a recent overt act is a determination the court must make as a matter of law.

Anderson’s consensual homosexual sex is distinguishable from the conduct in *Marshall*, 156 Wn.2d 150, and *Froats*, 134 Wn. App. 420, two similar cases where the court observed a recent overt act. In *Marshall*, this court found a recent overt act in the rape of a developmentally disabled woman. “In light of Marshall’s history [prior convictions of child molestation] and mental condition [pedophilia], the third degree rape, which involved *nonconsensual* sex with a developmentally disabled woman who functioned at the level of a 10- or 12-year-old, would create a reasonable apprehension of harm” *Marshall*, 156 Wn.2d at 159 (emphasis added).

In *Froats*, petitioner made unwanted advances to a fellow resident of a work release facility not fitting Froats’ victim profile. The State’s expert testified the conduct was a form of symptom substitution in which Froats acted out his pedophilic urges on an adult in the absence of a preferred victim. 134 Wn. App. at 437.

But here there are no allegations of rape or unwanted advances. Moreover, Anderson was never meaningfully sequestered away from his allegedly preferred

victims. Anderson was able to leave WSH, which he did frequently. In sum, there is no relation between Anderson's consensual homosexual relationship, history, and his mental diagnosis.

Significantly, the State filed its petition not in response to Anderson's sexual activities at WSH, but in response to Anderson's expressing his desire to leave WSH. The State never sought to commit Anderson during his residence at WSH, during which time Anderson openly engaged in the sexual behavior the State now calls evidence of Anderson's dangerousness. The relevant act, therefore, is not the conduct the State pardoned for years, but Anderson's expressing his desire to leave WSH, an act insufficient to show current dangerousness.

C. Dismissal is proper remedy

The Court of Appeals stated the remedy for insufficient evidence was remand not dismissal because "double jeopardy does not preclude retrial in the civil context" *Anderson*, 134 Wn. App. at 324. This is partly correct.

The Court of Appeals correctly noted under our existing precedent double jeopardy does not apply to sexually violent predator petitions because those petitions are "civil rather than criminal." *Young*, 122 Wn.2d at 59. However, as properly observed by Judge Armstrong, "if we hold that the State failed to prove a recent overt act, res judicata or law of the case would prevent the State from again litigating the issue on the *same evidence*." *Anderson* 134 Wn. App. at 328

(Armstrong, J., dissenting); *see also Hayes v. City of Seattle*, 131 Wn.2d 706, 712-13, 934 P.2d 1179, 943 P.2d 265 (1997) (providing a multipart analysis to determine if a subsequent suit would be permitted). Since the State failed to prove a recent overt act, the State should be precluded from again seeking to prove so using the same evidence. The appropriate remedy is dismissal.

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Therefore, I dissent.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:
